STATE OF MICHIGAN

COURT OF APPEALS

WISSAM MROUWEH, Plaintiff-Appellee,	UNPUBLISHED February 24, 2015
v	No. 321851 Wayne Circuit Court Family Division
GHANA SANDAKLY, Defendant-Appellant.	LC No. 11-104781-DC

Before: CAVANAGH, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant-mother appeals as of right from the trial court's order modifying custody and parenting time. Previously, the parties shared legal custody of their minor children, MM and HM, and defendant had sole physical custody. The trial court's order awarded plaintiff-father sole legal and physical custody and granted defendant supervised parenting time at least once each week, along with telephone contact with the children twice each week. We affirm.

As a preliminary matter, we reject plaintiff's argument that defendant's appeal was untimely and so this Court lacks jurisdiction.

MCR 7.204(A)(1)(b) provides that an appeal of right in a civil action must be filed within "21 days after the entry of an order deciding . . . a motion for rehearing or reconsideration . . . , if the motion was filed within the initial 21-day appeal period . . . ." The trial court's order denying defendant's motion for reconsideration was entered on May 9, 2014 and her claim of appeal was filed on May 19, 2014, well within 21 days. However, plaintiff claims that defendant's motion for reconsideration was untimely because defendant's motion was really a request for the court to reconsider its February 4, 2014 opinion, not its February 19, 2014 order. "[A] motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion." MCR 2.119(F)(1). Defendant's motion for reconsideration was filed on March 11, 2014.

Plaintiff's argument lacks merit. First, other than generally stating that "[a] careful reading" of defendant's brief makes clear that defendant wanted the court to reconsider the February 4, 2014 opinion, plaintiff does not explain why defendant's motion should be considered a motion for reconsideration of the February 4, 2014 opinion. Second, it is clear that the trial court intended for the order entered February 19, 2014 to be the definitive order

awarding plaintiff legal and physical custody. In the February 4, 2014 opinion, the court concluded that a change of custody was in the children's best interests, but the only action it *ordered* was for plaintiff to "draft an Order Modifying Custody and Parenting Time in conformity with this opinion with all the statutory required provisions within 14 days." Thus, the order entered February 19, 2014 was the order that actually changed custody. Therefore, defendant's motion for reconsideration, in which she asked the court to essentially vacate the February 19, 2014 order, was timely. As a result, the claim of appeal was timely and this Court has jurisdiction to hear the appeal.

Turning to the merits of the trial court's rulings, we first address defendant's argument that the court abused its discretion in modifying the prior custody order and granting plaintiff sole legal and physical custody.[1]

A party seeking to modify custody or parenting time must first show by a preponderance of the evidence "proper cause or a change of circumstances sufficient to warrant reconsideration of the custody decision." *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 657; 808 NW2d 811 (2011); see also MCL 722.27(1)(c). In this case, the trial court found that there was proper cause or a change of circumstances sufficient to reconsider the existing custody arrangement and defendant does not argue that this finding was erroneous.

Once the moving party has shown proper cause or a change in circumstances, the trial court must determine if the proposed modification would change the child's established custodial environment. See MCL 722.27(1)(c); *Parent v Parent*, 282 Mich App 152, 154-155; 762 NW2d 553 (2009). An established custodial environment "is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger*, 277 Mich App at 706. It is "marked by security, stability, and permanence." *Id*. MCL 722.27(1)(c) provides in relevant part:

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical

[1] When reviewing a custody order, this Court applies three standards of review. *Brausch v Brausch*, 283 Mich App 339, 347; 770 NW2d 77 (2009). First, this Court will not disturb the trial court's findings of fact unless they are against the great weight of the evidence. *Id*. A trial court's factual findings are against the great weight of the evidence if the facts "clearly preponderate in the opposite direction." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). Second, this Court reviews the trial court's discretionary rulings for an abuse of discretion. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). In custody cases, an abuse of discretion occurs when "the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id*. Finally, this Court must determine if the trial court made a clear legal error on a major issue; a clear legal error occurs when the trial court "errs in its choice, interpretation, or application of the existing law." *Shade*, 291 Mich App at 21.

> environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

"A custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order." *Id.* at 707, citing *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). A child can have an established custodial environment with both parents. *Berger*, 277 Mich App at 707. Whether an established custodial environment exists is a question of fact. *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007).

In finding that the children have an established custodial environment with plaintiff, but not defendant, the court found that the children no longer look to defendant for love, affection, guidance or support, stating:

> The children have expressed their preference to stay with their Father and expressed that they do not want to see their Mother. The children have reluctantly gone to court ordered visits and shun their Mother's hugs or other signs of affection. Since this case has started, the phone calls and visits between the Mother and children have been at times argumentative and forced.
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> The court finds that the children look to their father for all their parental [sic], love, affection, guidance, nurturing, and all their material needs. The children feel a since [sic] of security, stability and permanence with the Father. The children have had a physical and psychological environment solely with the Father since March 29, 2013.

The trial court did not err in concluding that the children do not have an established custodial environment with defendant. Defendant argues that the court should have considered who cared for the children before they moved in with plaintiff in March 2013. However, when evaluating this issue, "the focus is on the care of the child during the time period preceding the custodial trial[,]" *Kubicki v Sharpe*, 306 Mich App 525, 540; ___ NW2d ___ (2014), and the children had been living with plaintiff for nearly a year before the trial court made its custodial environment determination. Further, the evidence indicated that even if the children previously looked to defendant for "guidance, discipline, the necessities of life, and parental comfort," they no longer do so. MCL 722.27(1)(c). When interviewed by the trial court in chambers,[2] HM stated that she talks to plaintiff when she is upset and he helps her through it, would like to spend every day with plaintiff, and loves him a lot. Conversely, she indicated that she does not love defendant and wishes she "did not exist." MM's statements mirrored her sister's. She stated that defendant yells at her and punishes the children in bad ways, including striking them repeatedly with "sticks." She indicated that she loves plaintiff and wishes to spend all of her time with him.

[2] The in camera interviews of the children were transcribed by a court reporter and those transcripts are part of the record before this Court.

The reports from the supervised visitations at Growth Works indicate that the children were angry with defendant and generally refused to engage in activities with her during visits. These reports demonstrate that the relationship between the children and defendant was estranged and broken. Given the record, we find no error in the trial court's conclusion that the children did not look to defendant for "guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).

Both MM and HM stated that defendant left them alone for long periods of time and physically abused them frequently. HM said that if she did something wrong at defendant's house, defendant would pull her hair or slap her with a wooden spoon on her thighs, back, legs, or hand. MM also stated that defendant hit her with wooden, plastic, or metal spoons "lots of times" and "every week." While there may be reasons to question the credibility of some of the children's statements, the trial court found their accounts of physical abuse compelling, and "[w]e defer to the special ability of the trial court to judge the credibility of witnesses." *In re White*, 303 Mich App 701, 711; 846 NW2d 61 (2014).

Finally, defendant asserts that a new established custodial environment cannot be established "where a child is in a temporary and disrupted environment and there is an upcoming custody trial." Indeed, this Court has concluded that an established custodial environment did not exist when there were "repeated changes in physical custody" and "uncertainty created by an upcoming custody trial." *Hayes*, 209 Mich App at 388. However, the trial court's conclusion in this case that the children had an established custodial environment with plaintiff was not erroneous. The children began living full-time with plaintiff in March 2013 and when the court issued its opinion finding that the children had an established custodial environment with plaintiff, almost a year had passed. During this time, there were no "repeated changes in physical custody" or uncertainty about where the children would live. See *id*. Plaintiff had temporary custody of the children throughout those 11 months and defendant had supervised parenting time. Given the consistent custody arrangement during that time, the court did not err in finding that there was an established custodial environment and that it had not been destroyed.

Defendant next argues that the trial court erred in modifying the custody arrangement between the parties.

"When a modification of custody would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest." *Rittershaus*, 273 Mich App at 473. "If the proposed change does not change the custodial environment, the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the children's best interests." *Sturgis v Sturgis*, 302 Mich App 706, 710; 840 NW2d 408 (2013).

After concluding that the children had an established custodial environment with plaintiff, but not defendant, the trial court determined that defendant had the burden of proving by clear and convincing evidence that a change in that custodial environment was in the children's best interest. This was not the proper burden of proof. Plaintiff filed the motion to modify custody, so he had the burden of proving that changing custody from defendant to him

was in the children's best interests. *Rittershaus*, 273 Mich App at 473. Because the court concluded that the children have an established custodial environment with plaintiff but not with defendant, plaintiff's proposed modification—giving him physical custody—would not have changed the children's established custodial environment. Consequently, plaintiff only needed to prove by a preponderance of the evidence that the custody change was in the children's best interests. *Sturgis*, 302 Mich App at 710.

Although the court stated that defendant had to prove by clear and convincing evidence that giving her custody of the children was in their best interests, the court later concluded:

> Father has exceeded his burden of proof required and has shown by clear and convincing evidence that it is in the best interest of the children to change the prior custody order from joint legal and sole custody to the Mother to sole legal and sole physical custody to the Father for the minor children.

Accordingly, although the court's conclusion with respect to the burden of proof was clear legal error, the court subsequently found that plaintiff met his burden by clear and convincing evidence, a higher burden than preponderance of the evidence, which was actually required. The court's decision was supported by the evidence and, therefore, reversal is not required despite this error. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000) (this Court need not reverse if the trial court reached the right result, even if for the wrong reason).

The best interests of the child are determined by evaluating the best interest factors listed in MCL 722.23. When evaluating the best interest factors, the trial court need not "comment on every matter in evidence." *Sinicropi v Mazurek*, 273 Mich App 149, 181; 729 NW2d 256 (2006). Defendant argues that the court's findings on best interest factors MCL 722.23(a), (b), (c), (d), (e), (f), (h), (i), (j), and (k), were against the great weight of the evidence. In making this argument, defendant essentially asserts that the trial court erred in believing that defendant physically abused the children. Many of defendant's arguments with respect to the factors are also based on her contention that she was the children's primary caregiver for most of their lives.

To the extent that defendant argues the trial court erred in believing the children's statements that they were physically abused, again, this Court defers to the trial court's credibility determinations. *White*, 303 Mich App at 711. The court specifically found that the children's testimony and statements during their Kids-TALK interviews and in camera interviews were more credible than defendant's testimony, stating:

> The court did not believe the children were coached. Given the amount of times they have been asked similar questions it is bound to affect their delivery. The testimony of the girls was not exactly the same or sound rehearsed. The children are clearly afraid of their Mother and very angry about her treatment of them when in her care. They have consistently told the professionals and this court that their Mother has repeatedly hit them with a spoon over a period of time as well as leaving them home alone.

We will not disturb the trial court's findings of fact unless they are against the great weight of the evidence, *Brausch*, 283 Mich App at 347, and the court's credibility determinations were

supported by the evidence. As discussed above, both children stated that defendant hit them on many occasions and there were medical records indicating that the children suffered bruising and scratching after at least one of these incidents. In light of this evidence, the trial court's credibility determination regarding the children's accounts of physical abuse was not against the great weight of the evidence.

Defendant claims that the court erred in minimizing the testimony "of perhaps the most crucial witness, Corporal [Michael] Ball." Corporal Ball, the police officer in charge of the child abuse case against defendant, opined that the children's allegations of defendant physically abusing them and taking photographs of them in the nude were false. However, the court was the trier of fact and free to consider or not consider whatever evidence or testimony it saw fit. See MCR 2.613(C). As discussed above, the court found that the children's accounts were credible. Regardless of any inconsistencies in their statements or the allegedly suspicious timing of their allegations, this Court will defer to the trial court's credibility determination. *White*, 303 Mich App at 711.

Defendant takes issue with the court's purported failure to consider the fact that the children lived most of their lives with defendant, who was consistently involved in their education, medical care, and religious development. However, the court specifically acknowledged that defendant was the children's primary caregiver until they began living with plaintiff in March 2013 and noted that there was "evidence of happier times" between the children and defendant. The court observed that defendant provided the children with love, affection, and guidance in the past and was involved in their education and religious upbringing. However, the court recognized that circumstances had changed and the relationship between the children and defendant had broken down.

With respect to best-interest factor (a), "[t]he love, affection, and other emotional ties existing between the parties involved and the child," the court found that the emotional bond between defendant and the children was "estranged, detached, and fractured." See MCL 722.23(a). Given the children's testimony, this finding was amply supported by the evidence. By contrast, the children stated that they love plaintiff and wish to live with him. Accordingly, the trial court's finding that factor (a) favored plaintiff was not error.

With respect to factor (b), "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any," the court again noted that the children's relationship with defendant has broken down. MCL 722.23(b). The court found that defendant's "capacity to give love, affection and guidance to her daughters is diminished due to the breakdown of their relationship." The evidence demonstrated the children's reluctance to interact with defendant during visits or by telephone. Given the children's statements and the evidence regarding their behavior around and feelings toward defendant, the trial court's finding that factor (b) favored plaintiff was not error.

The evidence also supported the court's conclusion that factor (c), "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs," favored plaintiff. See MCL 722.23(c). As the court noted, defendant does

not have a job, rendering her future income uncertain. Plaintiff is employed and is able to financially provide for the children. In addition, the evidence showed that defendant took the children to the doctor and dentist consistently until October 2009 and the summer of 2010, respectively. Then, the children did not receive any dental cleanings or medical care until they began living with plaintiff, except for one visit in February 2012 when MM saw a doctor for abdominal pain. While plaintiff was not involved in taking the children to the doctor or dentist before March 2013, he has regularly taken the children since they began living with him. Thus, the most recent evidence supports the court's conclusion that factor (c) favored plaintiff.

Defendant asserts that the court's findings with respect to factors (d) ("[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity"), (f) ("[t]he moral fitness of the parties involved"), and (k) (domestic violence) were erroneous. Defendant's argument is based on her assertion that no physical abuse occurred. As previously discussed, the children's statements, medical reports, and our deference to the trial court's credibility determinations render this argument without merit.

Defendant claims that factor (e), "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes," weighs in her favor because defendant "continues to live in her home." The court found that this factor favors neither party. This factor "exclusively concerns whether the family unit will remain intact, not an evaluation about whether one custodial home would be more acceptable than the other." *Rains v Rains*, 301 Mich App 313, 336; 836 NW2d 709 (2013). Other than stating that she continues to live in her home, defendant does not explain how this factor favors her and, accordingly, the trial court's finding as to factor (e) was not error.

With respect to the reasonable preference of the child factor, MCL 722.23(i), defendant notes that the court's interview of the children "went beyond the usual permissible scope." However, defendant's trial counsel consented to the court's interview, even submitting potential questions, most of which went beyond the scope of the children's custody preference. The children's statements undisputedly indicate their preference to live with plaintiff, and, accordingly, the trial court's finding that factor (i) favored plaintiff was not error.

Finally, defendant claims that the court should have found that factor (j), "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents," favored her. The court found that this factor favored neither party and, after reviewing the record, this finding was supported by the evidence. The children testified that defendant made them ask plaintiff for money, that defendant spoke to the children about financial issues and child support, and that defendant argued with plaintiff about money.

Defendant argues that the trial court's parenting time order was "overly restrictive" and included an unconstitutional delegation of its authority to a parenting time coordinator.[3]

"Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents." MCL 722.27a(1). The Child Custody Act recognizes that parenting time is a right of both the parents and the child. *Delamielleure v Belote*, 267 Mich App 337, 340; 704 NW2d 746 (2005). MCR 722.27a(3) provides that "[a] child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health."

Defendant argues that the supervised parenting time is overly restrictive because the record does not support the finding that she abused her children. Again, the evidence presented and our deference to the trial court's credibility determinations refutes this argument. Equally significant is the fact that, for whatever reason, there has been a complete alienation between defendant and the children that was not caused by plaintiff. While, in time, defendant's parenting time may be expanded and unsupervised, it was not error for the trial court to conclude that, at this time, limited and supervised parenting time for defendant is appropriate.

Defendant also asserts that the trial court's order includes an unconstitutional delegation of authority to the parenting time coordinator. In its order modifying custody and parenting time, the trial court appointed a guardian ad litem and parenting time coordinator. Pursuant to the court's order, the parties were required to take all parenting time disputes to this coordinator, who would "coordinate and make recommendations regarding therapeutic intervention, parenting time and necessary services to the family to address the abuse and neglect issues." Any objections to the coordinator's recommendations could be filed as motions with the Friend of the Court referee. The court ordered plaintiff to pay all of the coordinator's fees until defendant became employed, after which the parties would divide the cost in proportion to their respective incomes.

In support of her argument, defendant relies on *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 121; 559 NW2d 54 (1996) (citation omitted), in which this Court stated:

> It is within the peculiar province of the judiciary to adjudicate upon and protect the rights and interests of the citizens and to construe and apply the laws. Thus, the trial court could not delegate its functions of making conclusions of law, reviewing motions, requiring the production of evidence, issuing subpoenas, conducting and regulating miscellaneous proceedings, examining documents and witnesses, and preparing final findings of fact.

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[3] "An appellate court must affirm a trial court's parenting-time orders unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Sturgis*, 302 Mich App at 709-710.

In *Oakland Co Prosecutor v Beckwith*, 242 Mich App 579, 581-584; 619 NW2d 172 (2000), this Court cited *Carson* and reluctantly concluded that the trial court exceeded its authority in appointing a special master. This Court noted that in both cases, the special master was given the authority to make findings of fact and conclusions of law, which were presented as recommendations to the trial court. *Beckwith*, 242 Mich App at 584. The court could then adopt the recommendations and "the trial court would enter judgment in the same manner as if the action had been tried by the court." *Id.*, quoting *Carson*, 220 Mich App at 123 (quotation marks omitted).

In this case, the court's order appointing the parenting time coordinator does not give the coordinator the authority to make final findings of fact or conclusions of law. It also does not allow the court to simply adopt the coordinator's recommendation. Rather, the order provides that if the parties disagree with the coordinator's recommendation, they can file a motion with the Friend of the Court referee. The motion will presumably be heard in the same manner as any other motion filed with the Friend of the Court. Nothing in the court's order indicates that the court or the Friend of the Court referee may adopt the coordinator's recommendation without properly hearing the motion and taking evidence if necessary. In sum, the court's order in this case is distinguishable from the orders appointing special masters in *Carson* and *Beckwith*. Accordingly, the court's appointment of the parenting time coordinator was permissible.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro